1967

Richard J. Young v. Julia M. Barney and Utah Farm Bureau Insurance Company : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD J. YOUNG,
Plaintiff and Appellant,

v.

JULIA M. BARNEY and UTAH FARM BUREAU INSURANCE COMPANY, a corporation,
Defendants and Respondents.

Case No. 10519

APPELLANT'S BRIEF

Appeal from the judgment of the Fifth District Court for Juab County
Honorable C. Nelson Day, Judge

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STATEMENT OF THE KIND OF CASE

This is an action to recover damages for the death of plaintiff's four-year-old child, who was killed as a result of being struck by an automobile driven by the defendant Julia M. Barney and after the defendant's insurance company entered the case through its attorney and took control of the defense, the plaintiff filed an amended complaint joining the defendant insurance

company as a defendant and alleging a cause of action against said defendant insurance company on its policy of insurance covering the individual defendant.

DISPOSITION IN THE LOWER COURT

The defendants filed a motion to dismiss the amended complaint and this motion was granted by the trial court as to the defendant insurance company. The court also denied plaintiff's motion for production of the policy of insurance upon which the amended complaint was based.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment of dismissal and order denying plaintiff's motion for production of the policy of insurance and an order remanding the case for trial against both defendants.

STATEMENT OF FACTS

The plaintiff initiated this action to recover damages for the death of his four-year-old child who was killed as a result of being struck by an automobile driven by the defendant Julia M. Barney. After the original complaint had been filed, it became apparent that the defendant driver was insured by the Utah Farm Bureau Insurance Company. The insurance company apparently pursuant to the provisions of a liability insurance

policy, issued for and on behalf of the defendant Julia M. Barney, proceeded to defend the driver.

In view of the foregoing, plaintiff, pursuant to leave of court, filed an amended complaint designating the Utah Farm Bureau Insurance Company, a corporation, as a defendant and prayed judgment against defendants and each of them.

In the amended complaint (R7) the plaintiff alleged that defendant Julia M. Barney was insolvent; that said defendant was insured under a liability insurance policy issued by the defendant insurance company to Von B. Barney, the husband of the defendant Julia M. Barney.

It was further alleged that by the terms of said policy the defendant company bound itself to pay all damages which the insured under said policy became obligated to pay because of bodily injury including death at any time suffered therefrom sustained by any person caused by or arising out of the use of the automobile referred to in the policy.

It was further alleged that the insurance policy expressly provided that the term "insured" included any person while using the automobile with the permission of Von B. Barney.

It was further alleged that the automobile referred to in the insurance policy was the same automobile which was being operated by the defendant Julia M. Barney at the time of the accident, which caused the

death of plaintiff's child and that it was being used with the consent and permission of Von B. Barney.

It was further alleged that the insurance policy was issued for the protection and benefit of persons who might suffer damage through the use and operation of the automoble and that by the terms of the policy, the defendant was bound to defend any suit against persons insured by said policy on account of damages arising as aforesaid and the company further bound itself to pay any judgment obtained in such suit against the person insured thereunder to the extent of the insurance mentioned in the policy (**R7**).

The defendants entered their appearance by a motion for an order striking and dismissing the amended complaint or in the alternative, to dismiss the amended complaint as to the defendant insurance company and to strike from the amended complaint all reference to said defendant and to said defendants' interest therein and to any and all reference to any contract of insurance (**R12**).

This motion states that it is made upon the grounds that the defendant insurance company is not a proper party defendant; that there is no privity of contract between the plaintiff and the defendant and that the basic cause of action alleged by plaintiff against defendant Julia M. Barney is in tort, that the defendant insurance company is not a tort-feasor, that the cause of action alleged against the defendant insurance company is in contract and that a cause of action in tort

and in contract against different parties may not be maintained and pursued in the same action.

Plaintiff thereafter filed a motion for production of document wherein it moved for an order that the defendants be required to produce the policy of insurance covering Von B. Barney and in force on the 18th of August, 1964 (R16). This motion was supported by an affidavit of plaintiff's attorney setting forth that one of the issues in the case was the construction of the terms and provisions of said policy and further asserting that the amount of the policy limits would be material in determining the interest of the defendant insurance company and would be of aid in settling the above entitled lawsuit and that the plaintiff could only obtain the policy from the defendant insurance company. The plaintiff filed interrogatories directed to the matters concerning the insurance policy (R17).

The two motions came up for hearing before the court and the court entered a judgment dismissing the amended complaint and cause of action against the defendant insurance company and denied plaintiff's motion for production of the insurance policy mentioned above. The court also denied the request by plaintiff for answers to interrogatories.

POINT I

THAT THE COURT ERRED IN DISMISSING THE AMENDED COMPLAINT AGAINST THE DEFENDANT INSURANCE COMPANY.

Rule 18(a) of the Utah Rules of Civil Procedure provides as follows to wit:

> "Joinder of Claims. The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20 and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied."

Rule 18(b) provides as follows:

> "Joinder of Remedies; Fraudulent Conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money."

Rule 20 of the Utah Rules of Civil Procedure provides in part as follows:

> "All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same

transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities."

These three rules are identical with the same numbered rules of the Federal Rules of Civil Procedure.

Considering the language of these rules, there is no reason why the defendant insurance company should not be made a party to an action in which it has agreed to pay a claim only after another claim has been prosecuted to a conclusion. Rule 18(b) expressly states that in such event the two claims may be joined in a single action.

It is alleged in the amended complaint that the defendant bound itself by its policy of insurance to pay all damages which the insured became obligated to pay because of bodily injury, including death, caused by or arising out of the use of the automobile referred to in the policy. This Court by the Utah Rules of Civil Procedure has established the rules which should prevail in the trial of lawsuits in this state and we submit that the allegations of the complaint bring the defendant within the meaning of said rule 18(b) and it was proper to join the defendant insurance company in this action.

The trial court refused to require the defendants to produce the insurance policy upon which this action is based, so we cannot determine the exact terms and provisions of this policy.

The courts have generally held that where a policy of insurance contains a provision that no action shall be brought against the insurer until after the determination of the liability of the insured by a final judgment, that an action cannot be brought in the first instance against the insurer until the determination above indicated has been made. See annotation at 159 A.L.R. 763.

We do not know whether or not this policy contains a "no action clause" but even if it does, we still believe this case is distinguishable from those holding the defendant insurance company as not a proper party. Although we have not seen the policy because of the prevalence of this clause, we request the Court to consider that the policy contains such provision in order to avoid a second appeal.

The plaintiff did not bring in the defendant company until it had taken over the defense of this case. We submit that under such circumstances, the defendant insurance company is in no position to assert the "no action clause." None of the authorities have considered this fact and the present case is distinguishable on this ground.

In *Dryden v. Ocean Accident & Guarantee Corp., Ltd.*, 138 F.2d 291 (CCA7—1943), the insured defen-

dant sought to bring into the case by third party proceedings his insurer in order to make him defend the action and pay any judgment which might be rendered against the employer.

The insurer contended that the third party complaint should have been dismissed in view of a clause in the policy that no action would lie against the company to recover upon any claim or for any loss unless brought after the amount of such claim or loss should have been fixed and rendered certain by a final judgment against the insurer. This contention was rejected, the court conceding that the insurer's argument that inasmuch as there was no final judgment recovered against the insured, no suit laid against the insurer would have been sound were it not for the fact that the policy in another part imposed the liability on the insurer to defend in the name and on behalf of the insured any suit on account of such injury, and the court held that in view of such additional provision, the contention could not be sustained.

The court stated:

> "Insurer also complains that the third party complaint should have been dismissed because under paragraph Seven G of the policy 'No action shall lie against the Company to recover upon any claim or for any loss * * * unless brought *after* the amount of such claim or loss either by final judgment against this Employer after trial of the issue * * *.' Since, they allege, there is yet no final judgment, no suit lies against

them. Such a construction would appear logical were it not for the fact that the same policy, in paragraph Three thereof, imposes the liability on the insurer 'To Defend, in the name and on behalf of this Employer, any suits or other proceedings which may at any time be instituted against him on account of such injuries, including suits or other proceedings alleging such injuries and demanding damages or compensation therefor, * * *.' "

See also *Rowley v. United States,* 140 F.Supp. 295 (Utah-1956).

In 2 Barron and Holtzoff Federal Practice and Procedure, Page 81, Section 505, the authors have this to say:

"The literal language of Rule 18(b) would seem to permit joinder of a claim against a tortfeasor with a claim against the insurer is one heretofore cognizable only after another claim has been prosecuted to a conclusion. It may be argued that the 'no action' clause of the insurance policy bars suit against the insurer prior to judgment against the insured, but this very argument has been uniformly rejected by cases holding that an insurer may be impleaded pursuant to Rule 14 despite the existence of a 'no action' clause. And a significant recent decision from the Tenth Circuit holds that where an insurance policy provided that the insurer was not liable until the liability of another insurer had been determined, both insurers may be sued in one action. The court answered the argument that the action against the insurer protected by the policy provision was premature by saying:

'Rule 18(b) of the Federal Rules of Civil Procedure covers this situation * * * .' A number of states have rules or court-made policies prohibiting joinder of an insurer but it is not clear that these affect the outcome and thus must be followed by a federal court; similar state policies prohibiting actions to set aside fraudulent conveyances until the claimant has reduced to judgment his money claim, and had that judgment returned unsatisfied, are held not controlling in federal court in view of Rule 18(b). Even though these arguments seem unsatisfactory, the decisions, with the single exception of the atypical Tenth Circuit case discussed above, have refused to allow joinder of the insurer. Undoubtedly the courts have been influenced by the almost universal practice of keeping from the jury the fact that a defendant carries liability insurance."

The 10th Circuit Court case referred to is the case of *Millers National Insurance Company v. Wichita Flour Mills Company*, 257 F.2d 93 (1958).

We submit that it is time for this Court to say that the rules of civil procedure of this state prevail and that any provisions of contracts on insurance policies must give way to the superior position of these rules. A contract which attempts to contavene these rules certainly is against the public policy therein set forth.

It has been held that a "no action" provision is contrary to the public policy of rule 14 of the Federal Rules of Civil Procedure and should therefore not be enforced. See *Jordan v. Stevens*, 7 F.R.D. 40 (Mo. —

1945), and *McLouth Steel Corp. v. Mesta Machinery Company*, 17 Fed. Rules Serv. 14(a) 221, Case 1 (Pa. — 1952).

There is no question that over the years the courts have been influenced, as indicated in the above quote, by the fact that insurance should never be mentioned during the trial of the case, because it would possibly have an adverse effect upon the jury in either rendering a verdict for plaintiff or increasing its amount.

However, there is another side to this coin. Through the years it has been my experience that in cases defended by insurance companies, the insurance company in defending the case tries in every way possible to make it appear to the jury that the individual defendant is the one that will be liable to pay the judgment and will be the victim of a judgment large or small.

The insurance company has the individual defendant sit at the table along with any family that the insured has and creates the feeling and atmosphere that these defendants are the ones who will pay the judgment.

We also believe that if these defendants obtain the sympathy of the jury, it refuses to return a verdict against such persons not on the facts of the case but in sympathy. If the insurance company were made to be a party to these cases, this type of injustice could not be perpetrated and we submit that it is more important to prevent this type of situation from arising than to pro-

tect the insurance company from a supposed pre-determination of the jury against such insurance company.

We feel sure that trial courts have often had a feeling of aversion to playing cat and mouse with the jury. The court sits there knowing that the insurance company is in fact a party defendant and is participating in the case to the extent of completely controlling the defense, yet it must constantly be on the lookout to prevent any mention of this fact to anyone. Many times the attorney for the plaintiff is attempting to use sly methods of bringing to the attention of the jury the fact that insurance may be involved. This has been accomplished through questions to the venire previous to trial. It sometimes slips out during the course of the testimony of one or more of the witnesses. The insurance company likewise attempts in every way possible to prevent the disclosure of the fact of insurance and of the fact of the insurance company's participation in the trial. As indicated above, it seeks to convey the inference that the individual defendant will have to pay the judgment.

On at least one occasion the writer of this brief has heard a trial court assert this feeling and a hope for the time when everything would be brought out in the light of day and the factual situation presented before the jury and the contest between a plaintiff and the defendant insurance company would be fully revealed to the jury. It is our hope that the time for this has now arrived in the state of Utah.

As has been indicated, in some cases, that in this day and age, the fact that there is insurance in the case does not have the effect on juries that it once had. Modern-day jurors are much more sophisticated than they were several years ago. This is particularly true in view of the campaign that has been carried out in advertising on a national scale that juries sit upon the amount of their own insurance premiums.

This thought has been expressed by Judge Hincks in *Schevling v. Johnson,* 122 F.Supp. 87 (Conn. – 1953) wherein he stated:

> "Indeed, it is my personal opinion, based on other cases, that the disclosure in a negligence case of the presence of an insurer's interest tends to make a jury conscious of the impact of verdicts on insurance premiums and hence tends to emphasize the importance of the jury function. Such a result, obviously, is not prejudicial to insurers. Nor is it destructive of justice to plaintiffs. Justice does not require that lawsuits shall be torn from their context in contemporary life and be tried in an artifically produced vacuum. Occasionally, when the presence of an insurance company is disclosed through its inclusion as a named party or through inadvertence and especially when its presence is disclosed through improper tactics, there may arise need for the judge to make some reference to the relationship between verdicts and the structure of the insurance business in order to impress the jury with the need for a sense of responsibility in its verdict. But only undue cynicism will support the thesis that knowledge of the presence of an insurer's interest will necessarily

distort a juror's judgment. I feel sure that such knowledge was not prejudicial here."

The Utah Supreme Court in *Robinson v. Hreinson*, 17 Utah 2d 261, 409 P.2d 121 (1965) indicates a step in the right direction in this field. There the subject of insurance was mentioned before the jury but the court refused to reverse the case and in so doing used the following language:

> "We are not so callous as to be entirely without appreciation for the position of the defendant in such circumstances, though perhaps not quite so keenly affected as defense counsel, who quite generally seem to have highly developed sensibilities to the mention of the subject of insurance, in somes instances entirely too much so, of which we think this is a good example. In our judgment there are some basic fallacies involved in assuming that any mention of insurance automatically results in such prejudice that a motion for a mistrial should invariably be granted.
>
> The first is the assumption that the jurors are so unaware of the facts of life that they are oblivious to the subject of insurance unless someone mentions it. They should be given credit for being people of average intelligence and reasonably cognizant of the realities of existence. Among other things, they drive automobiles and are concerned with financial responsibility for accidents that may happen. Since 1951 we have had our financial responsibility act, the practical effect of which is that nearly all cars are covered by insurance and the popular belief seems to be that it is compulsory.

> In applying the law to the everyday affairs of life it is the duty of the courts to be as practical and realistic as possible and to keep abreast of changing times. For that reason, and because it has become the almost universal custom to carry insurance, they are not nearly so apprehensive that mention of this subject in the presence of the jury will be prejudicial as they formerly were."

In a footnote the Court noted that Texas without statutory authorization has permitted joinder of the insurance company and Louisiana and Wisconsin have statutes permitting such joinder. The Court referred to authorities supporting the tendency generally toward disclosure of the truth in regard to insurance.

The defendant insurance company also contended that there could be no joinder because there was no privity between plaintiff and the defendant insurance company, however, in third party beneficiary cases, such actions are allowed.

In Utah it is well established that a person for whose benefit a contract is made, may sue on the contract without having been a party to the contract or to the consideration. *Montgomery v. Spencer,* 15 Utah 495, 50 P. 623, *Brown v. Markland,* 16 Utah 360, 52 P. 597, *Smith v. Bowman,* 32 Utah 33, 88 P. 687. The reason for this rule is to avoid a multiplicity of suits and that the decree judgment should finally and completely determine the rights of all persons having interest in the event of the suit.

The defendant insurance company also contended that claims for tort contract cannot be joined, however, under the above quoted rules, a great deal of liberality is permitted in the joinder of claims. See 2 Barren & Holtzoff (Wright Edition), Page 75, Section 504.

A further argument for joinder is that there is a common question of law and fact as against each of the plaintiffs. That is, the liability and amount thereof so far as the individual is concerned and the insurance company by being a party, will be bound by this determination and such finding is one of the necessary conditions upon which liability of the insurance company is based.

We submit that plaintiff here presents a proposition which has not yet been ruled upon and that is that the status that the insurance company should be permitted to assume after it has taken over the defense of the case. It is our contention here that this brings them into court and in all honesty and fairness, requires that their presence be disclosed.

Also under the foregoing rules, any argument against such joinder appears to be unsatisfactory and the Court should now rule that truth should out in the trial of these negligence cases.

POINT II

THE COURT ERRED IN REFUSING PRODUCTION OF THE INSURANCE POLICY.

The action so far as the insurance company is concerned was based upon this insurance policy. The Court and plaintiff are uninformed as to the contents of this document and must guess at its provisions although generally we know what these policies usually contain. We are unable to even tell whether or not there is, in fact, a "no action" clause in this policy. How a document upon which an action is based can be irrelevant and immaterial, is a little hard to understand. There is no privilege involved and it should have been produced.

Even though the action were not on the policy, many authorities hold that it should be produced in order that the plaintiff could know the extent of the interest of the insurance company and that it might also be helpful in the settlement of the case. See the annotation in 41 A.L.R. 2d 968 and the supplemental decisions thereto found in 4 A.L.R. 2d later case service, page 756.

Admittedly there is a split of authority upon this proposition.

We submit that the defendant should be required to produce the insurance policy.

POINT III

A REFUSAL TO JOIN THE DEFENDANT INSURANCE COMPANY VIOLATES THE CONSTITUTIONAL RIGHTS OF THE PLAINTIFF UNDER THE UTAH AND THE UNITED STATES CONSTITUTIONS.

The Court should heed the admonition contained in the Constitution of the State of Utah, Article I, Section 27, wherein it states:

> "Frequent recurrence to fundamental principles is essential to the security of individual rights * * * ."

An individual plaintiff in these cases is opposed by an insurance company with all its resources. It is not a contest between the plaintiff and the nominal defendant. To hide this fact and not let it be brought out into the open, violates the 14th Amendment of the United States Constitution in that it abridges the privileges of a citizen of the United States, deprives him of property without due process of law and does not afford to him the equal protection of the laws. See also Sections 7, 10 and 11 of Article I of the Constitution of the State of Utah relating to due process, trial by jury and open courts.

Freedom of access to the courts and the guarantees of equal justice and equal privileges and immunities and fair trial by due process of law and right to trial by jury of issues of fact are infringed if the courts permit a party who is a real party defendant in interest to come in in disguise or behind a shield and take over and control defense of an action against another party. Contractual clauses purporting to give such a right cannot be upheld. To allow a party to circumvent constitutional or statutory provisions by contract in advance violates a fundamental principle of Magna Charta, "We will deny to no man either justice or right."

> "Among the privileges and immunities of citizenship is included the right of access to the courts for the purpose of bringing and maintaining actions. This includes the right to employ the usual remedies for the enforcement of personal rights in actions of every kind—a right which cannot be abrogated or even suspended. It has been said that the right to sue and defend in the courts is one of the highest and most essential privileges of citizenship." 16 Am. Jur. 2d 838, Sec. 481.

The right to a fair and impartial trial and the right to proceed by due process comes within the protection of the Fourteenth Amendment to the Federal Constitution. The right is violated if a person who is obligated to pay the judgment, and is therefore the real party defendant in interest, is permitted to come in and take control of defense of the action and plaintiff is denied the right to make such a person a party defendant. The right is violated if an insurance company is permitted to conceal its interest and conduct the defense in the name of an insolvent defendant and justify such action by the claim that juries cannot be trusted to be impartial with insurance companies. Denial of jury trial against a defendant which is the real party defendant in interest is a denial of due process and a denial of equal protection of the laws and of equal access to the courts.

The protection of the Fourteenth Amendment extends not only to protection against the legislative power of the states but also to the judicial and executive powers.

CONCLUSION

We submit that it is time for this Court to bring honesty and fair play into the trial of lawsuits, particularly in a case where the insurance company has already come in and taken over the defense of the case.

We submit that the court erred in granting the motion of the defendants and in denying the motion to produce of the plaintiff.

The case should be returned for trial on the amended complaint as it now stands.

Respectfully submitted,

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